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No. 83-1816

In The
Supreme Court of the United States
October Term, 1983

WILLIAM JIBSON,

Appellant,

vs.

WHITE CLOUD EDUCATION ASSOCIATION,

Appellee.

On Appeal From the Court of Appeals of Michigan

MOTION TO DISMISS

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MOTION TO DISMISS

Plaintiff-Appellee White Cloud Education Association moves, pursuant to Rule 16 of the Rules of the Supreme Court, that the appeal herein be dismissed on the ground that the question on which the decision of the cause depends is so unsubstantial as not to require further argument.

OPINION BELOW

The challenged decisions of the Michigan Court of Appeals and of the Circuit Court for the County of Newaygo are set forth in the appendix of Appellant's Jurisdictional Statement.

—o—

JURISDICTION

The jurisdictional requisites are set forth in Appellant's Jurisdictional Statement.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are set forth in Appellant's Jurisdictional Statement.

—o—

COUNTER-STATEMENT OF THE CASE

Appellant William Jibson was allowed to intervene in this case on June 19, 1979, some seven weeks after the Newaygo County Circuit Court had issued its April 25, 1979 Opinion and Order on the central issue that had been briefed and argued by the White Cloud Education Association and the White Cloud Board of Education. That issue, a matter of state law, was whether the discharge remedy in the agency shop provision of the collective bargaining agreement negotiated by those parties, and authorized by Michigan's Public Employment Relations Act, Mich. Comp. Laws § 423.210(1)(c), (2), was in conflict with the Michi-

gan Teacher Tenure Act, Mich. Comp. Laws § 38.71 *et seq.* Such conflict had been perceived by the Board of Education, whose consequent refusal to enforce the agency shop provision against Mr. Jibson caused the Association to file a declaratory judgment action against the Board.

After the circuit court's decision ruled the agency shop provision lawful, Mr. Jibson sought to intervene in order to assure that he would have standing to appeal the circuit court's decision to the Michigan Court of Appeals. The Board of Education cooperated with proposed intervenor Jibson by filing a motion for new trial, although the Board's counsel did not appear at the hearing thereon. The arguments in connection with the motion for new trial were heard in an informal conference in chambers and no record was made.

During that conference "the Court recognized the constitutional limitation upon an agency fee imposed by the United States Supreme Court in *Abood.*" Brief of Intervenor Defendant-Appellant William Jibson 30 (filed August 29, 1979, in the Michigan Court of Appeals). Although the union had adopted an agency fee objection procedure modeled after the one described in *Abood v. Detroit Board of Education,* 431 U.S. 209, 240 n. 41 (1977), Appellant not only declined to utilize that remedy but, most significantly, his offer to pay an agency fee into escrow was conditioned on the union disavowing its own objection procedure and instead commencing a lawsuit for the purpose of proving what portion of the contractual agency fee Mr. Jibson could be required to pay.

Because the circuit court's rejection of *this* limited escrow offer was in no way a ruling on the propriety of

escrow accounts generally, this case does not present a substantial federal question.

———o———

ARGUMENT

The Case Presents No Substantial Federal Question

Appellant's jurisdictional statement suggests that the question presented is whether the Michigan agency shop statute is unconstitutional if it is applied to allow a union, prior to *any* adjudication of the amount of a constitutionally permissible agency fee, to spend a dissenting employee's compulsory fee for political or ideological purposes unrelated to collective bargaining. However, the ruling of the Newaygo County Circuit Court, affirmed by the Michigan Court of Appeals, was far narrower than Appellant suggests. The Appellant never made an unconditional offer to pay the agency shop fee into an escrow account to avoid his discharge—rather, he only offered "to pay into an escrow account an amount equivalent to the dues uniformly required to be paid by members of the White Cloud Education Association (MEA, NEA & WCEA) as soon as the Association files a suit, in a court of competent jurisdiction, to prove the Intervenor's *pro rata* share of the Association's cost of collective bargaining, contract administration and grievance adjustment." Answer of Intervenor, ¶ (9) (filed May 24, 1979). Because of the limited nature of that offer, this case does not present the question whether, for example, an escrow approach is required where a dissenting employee utilizes a union-established procedure for determination of the

agency fee amount that an employee may constitutionally be required to pay. *See Abood,* 431 U.S. 209, 240 n. 41.

Appellant argues that the question presented in this case was answered by this Court in *Ellis v. Railway Clerks,* 52 U.S.L.W. 4499 (U.S. Apr. 25, 1984), and that the decision therein establishes that the ruling of the Michigan Court of Appeals in the instant case was erroneous. That contention ignores the fact that in *Ellis* this Court's rejection of a pure rebate scheme was found to violate the Railway Labor Act, not the First Amendment. Unlike the statute which this Court in *Ellis* construed as not authorizing union expenditures, over an employee's objection, of the full amount of dues paid by non-dissenting, voluntary union members, the Michigan Public Employment Relations Act explicitly sanctions agency shop agreements compelling non-union employees "to pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Mich. Comp. Laws § 423.210(1)(c).

Moreover, in the present case the constitutionality of the pure rebate approach (i.e., not offering the dissenter the opportunity to pay a reduced agency fee—such as might be determined by subtracting from the full dues-equivalent agency fee a pro rata share of union expenditures on political or ideological activity unrelated to collective bargaining) is not presented because Appellant was unwilling to pay even such a reduced fee to the union. As noted above, Appellant was unwilling to pay anything into an escrow account unless the union first commenced and concluded, at whatever significant litigation costs and delay, an allocation suit. Answer of Intervenor ¶ (9) (filed May 24, 1979).

On June 19, 1979, when Appellant and Appellee approved the form of the order entered by the circuit court on that date, Appellee's designation of "the appropriate amount of the agency shop fee" (J.S. App. 19a) was based on Appellee's own acknowledgment that *Abood* mandated a reduced agency fee since a portion of the agency fee to be collected by the Appellee for its affiliates, the Michigan and National Education Associations, would be spent on political or ideological activities unrelated to collective bargaining. While that effort of Appellee to reduce Appellant's agency shop fee was not based upon what a *court* had already determined to be the correct reduction (since no court had made any such allocation), the circuit court made it clear that *it* would, upon the request of the Appellant and after his payment of the requested amount to Appellee, "determine the appropriate amount of the agency shop fee pursuant to *Abood*." June 19, 1979 Order, J.S. App. 19a.

Appellant apparently contends that the reference in this Court's *Ellis* decision to "advance reduction of dues" requires that an advance reduction be calculated by a court, not by the union itself. Appellee respectfully disagrees with that contention and suggests that it is constitutionally acceptable for the advance reduction to be initially calculated by the union although subject to review, if challenged by the dissenting employee, in a state administrative agency possessing the appropriate labor expertise to apply the general pronouncements of *Abood* to specific union expenditures. In Michigan that agency is the Michigan Employment Relations Commission ("MERC"), the "administrative body having expertise in state labor matters." Brief of Intervenor Defendant-

Appellant Jibson 32 (filed August 29, 1979, in the Michigan Court of Appeals).

Appellant apparently cannot perceive any difference between (1) the "pure rebate approach," involving the union's exaction and use of *full* dues, found to constitute a *statutory* violation in *Ellis,* and (2) an approach in which the union, upon notice of the dissenter's constitutional objection, reduces the required agency fee based on its own calculation of union expenditures on political or ideological activities unrelated to collective bargaining. Thus Appellant refers (J.S. 11) to the decisions of the Michigan Court of Appeals both in the present case and in *Kempner v. Local 2077, State, County & Municipal Employees,* 126 Mich. App. 452, 459-61, 337 N.W.2d at 354, 357-58 (1983), as cases in which "lower courts saw no constitutional defect in permitting unions to use union- or agency-shop provisions as a means of obtaining forced loans to subsidize their political and ideological activities unrelated to collective bargaining."

Both the record and the discussion of the competing interests are more thoroughly set forth in the *Kempner* decisions than in the present case. Appellant has asserted that both cases sanction unconstitutional forced loans. We suggest that an examination of *Kempner* will illustrate both the nature of the constitutional contention in both cases and also the reasons why the present case does not merit plenary review by this Court.

Kempner was initially litigated before, and decided by, an administrative law judge ("ALJ") whose 1981 decision was appealed to the Michigan Employment Relations Commission which, in its 1982 affirmance of the compre-

hensive decision of the ALJ, summarized that decision as follows:

> The ALJ held that in order for a Union to lawfully demand the discharge of a nonmember for failure to pay an agency fee the Union must, after the nonmember has given notice to the Union of the fact of her objection, provide the objecting nonmember with a figure allowing him to reduce the amount of his monthly fee by the percentage of the Union's annual budget spent for ideological or political purposes unrelated to collective bargaining. In making this computation the Union may use its own definition of ideological or political purpose as long as that definition is a good faith application of current case law. After receiving this information from the Union, the objecting nonmember must commence paying a reduced fee, consisting of the normal agency fee less the percentage given him by the Union. Until the Union provides the objecting nonmember with this figure, he need pay nothing. The requirement that the objecting nonmember be allowed to pay a reduced fee was imposed by the ALJ to ensure that the nonmember need not pay, even temporarily, monies to which the Union is not entitled. If the objecting nonmember refuses to pay the reduced fee after the Union has provided him with the figure discussed above, the Union may then demand his discharge. The objecting nonmember may, of course, if dissatisfied with the figure given by the Union, pursue other remedies to obtain a final allocation of the fee. He must pay the reduced fee pending this litigation, however.
>
> 1982 Mich. Empl. Rel. Comm'n. Lab. Op. 287, 288-90 (March 11, 1982).

The Michigan Court of Appeals affirmed MERC's *Kempner* decision, and the case is presently pending before the Michigan Supreme Court on the Plaintiff's Application for Leave to Appeal. The 25-page decision and

recommended order of ALJ Sperka in *Kempner*, 1982 Mich. Empl. Rel. Comm'n. Lab. Op. 291 *et seq.*, is a carefully reasoned effort "to reconcile the cases and create a rational procedure which will protect the rights of all the parties and harmonize the decisions as much as possible." *Id.* at 309.

In addition to rejecting the dissenting employee's claim that an escrow approach is constitutionally necessary (choosing instead to compel the union to provide the employee with a reduced agency fee request), ALJ Sperka also recognized that a fair agency shop fee allocation procedure should avoid "relitigation of the same fees by different employees." *Id.* at 310. He explained that this could be accomplished by requiring only a single employee to exhaust the union's internal fee calculation procedure subject to appeal to MERC. In 1982, after ALJ Sperka's decision was affirmed by MERC, the Michigan Education Association (the state affiliate of Appellee herein) promulgated a revised policy and procedures for administering agency shop objections based on the *Kempner* decision. Appendix A. Because that policy is applicable to all of the Michigan local associations affiliated with the Michigan Education Association it will now apply to all agency shop disputes arising under contracts negotiated by Appellee. For that reason alone the *Kempner* litigation presents a far better vehicle for clarifying and approving agency shop procedures than the instant case with its sparse record and exceedingly narrow escrow issue.

However, if this Court believes its *Ellis* decision warrants immediate reconsideration by the Michigan courts of the general subject of demand and return agency fee schemes (in the light of the availability of escrow or ad-

vance reduction approaches), a remand of the present case for consideration, *inter alia,* of the Michigan Education Association's intervening adoption of the *Kempner* reduced fee approach would offer one vehicle for such reconsideration.

ALJ Sperka's concern that an agency shop procedural system should avoid relitigation of the same fees by different employees is an additional reason justifying the Michigan Court of Appeals' affirmance of the circuit court's refusal to accept Appellant's offer to pay into an escrow account only if the Association first filed an allocation lawsuit. Appellant's suggestion that the Michigan courts were constitutionally compelled to refuse to enforce the agency shop clause unless the union first filed such an allocation lawsuit, if accepted, would flood the courts with numerous lawsuits likely to end with conflicting results.

Abood teaches that the eobjective of a remedy in these cases is "to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" 431 U.S. 209, 237 (1977) (emphasis added). A hypothetical illustration will demonstrate how Appellant's contention necessarily frustrates that goal. Assume that a single teacher in each of 25 Michigan school districts (whose teachers are represented by local associations affiliated with the Michigan and National Education Associations) objects to a contractual obligation to financially support his bargaining representative. Notwithstanding the long history of enforcement of union security provisions through the discharge of non-complying employees, Appellant's argument would prevent the union from

receiving any financial support whatsoever from any of those 25 unless the union finances 25 *different* allocation lawsuits of the type Appellant demanded herein—even though the expenditure information for the Michigan Education Association and the National Education Association would be the same in each case. Setting aside the significant possibility of conflicting results in those various cases,[1] it would still follow that the net effect of these expensive lawsuits would be that the union would spend far more in each suit than the amount recovered from that single objecting employee. That result would defeat not only the quoted remedy objective set forth in *Abood* but also the explicit "fair share" policy of the Michigan public-sector agency shop statute.

As evidenced by the *Kempner* decision and the Michigan Education Association's reformulation of an agency shop policy and procedures based thereon, it is apparent that significant Michigan evolution of the requirements of *Abood* has occurred since 1977. Under these circumstances we suggest that this Court's plenary review of the present case—in which Appellant's conditional escrow proposal was belatedly raised and not even briefed in the trial court by either Appellant or Appellee—would be a waste of this Court's resources. While continued clarification of the law of agency shop will ultimately be necessary, this case fails to present a substantial federal question.

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[1]That problem is avoided by the "quasi 'class action' quality" inherent in the MERC approach adopted by *Kempner*. 1982 Mich. Empl. Rel. Comm'n. Lab. Op. at 310.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument, and Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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APPENDIX A

Michigan Education Association Policy and Procedures Regarding Political-Ideological Expenditures

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POLICY

Upon timely objection, no individual required to pay a service fee to a local association affiliated with the Michigan Education Association (MEA) shall be required, through the payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An individual who, in compliance with the administrative procedures established by the Executive Director of Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be entitled to pay a reduced fee based upon the Executive Director's determination of the percentage of the MEA's annual budget spent for ideological or political purposes unrelated to collective bargaining, contract administration, grievance adjustment and employee representation.

ADMINISTRATIVE PROCEDURES

Section I

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through

the 15th of each year and shall specify those causes, programs, and activities to which the individual objects, or that the individual objects to the use of a portion of her/his service fee for any political activity or ideological cause unrelated to collective bargaining, contract administration, grievance adjustment and employee representation. An objection must be renewed each fiscal year (September 1 to August 31).

Upon receipt of the objection, the Executive Director (of her/his delegate) shall determine first whether the cause, program, or activity to which the individual objects is in fact an ideological cause or political activity within the meaning of the policy. An ideological cause or political activity within the meaning of the policy is one which is unrelated to organizing, collective bargaining, contract administration, grievance adjustment or employee representation. Second, the Executive Director or her/his delegate, if she/he determines that in fact the cause, program or activity to which the individual objects is an ideological cause or political activity, shall determine the pro rata amount of the individual service fee that has been expended upon or will be expended upon such cause, activity or program. If the individual has objected to the use of a portion of her/his service fee for any political activity or ideological cause, as defined herein, the Executive Director or her/his delegate shall determine (1) the pro rata amount of the individual service fee that has been expended or will be expended on all such causes and activities and (2) the reduced fee accordingly required to be paid by the individual. Upon written request, the Executive Director or her/his delegate shall provide to the individual a copy of the approved budget for the year in question.

Section II

An individual dissatisfied with the determination of the Executive Director may appeal that determination to the Executive Committee of the Board of Directors of the Michigan Education Association. An appeal to the Executive Committee may be taken within 30 days of receipt of determination of the Executive Director. The appeal shall be taken by giving a written notice to the Executive Director of the individual's desire to appeal her/his determination to the Board of Directors. The individual, along with her/his notice of appeal, may submit to the Executive Committee such written statements and other evidence in support of her/his position as she/he deems necessary. The Executive Committee shall reach a decision upon the appeal as soon as practicable, preferably within 60 days from receipt of the appeal. If the individual is dissatisfied with the decision of the Executive Committee, she/he may further appeal by commencing, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission.

Section III

These procedures apply to amounts remitted to the Michigan Education Association as well as amounts retained by the local associations affiliated with the Michigan Education Association. The local associations shall reimburse the Michigan Education Association for any amounts rebated on its behalf under the policy.